(15)

No. 92-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

JOHN S. YODICE
Counsel of Record
RICHARD K. KETLER
YODICE ASSOCIATES
500 E Street, S.W., Suite 930
Washington, D.C. 20024
(202) 863-1000
Counsel for Aircraft Owners and Pilots Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,
v.
COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

The Aircraft Owners and Pilots Association (AOPA) respectfully submits this brief as *amicus curiae* supporting affirmance of the judgment below. Letters reflecting the consent of Petitioners and Respondents to the filing of this brief are filed contemporaneously herewith.

STATEMENT OF INTEREST OF AMICUS CURIAE

AOPA is the world's largest organization of individual aircraft owners and pilots engaged in the non-carrier segment of aviation known as "general aviation." General aviation, in terms of the numbers of aircraft and hours flown, is significantly larger than either the air carrier or

military segments of aviation in the United States.[1] AOPA is a nationwide, non-profit association of 316,000 members who own a majority of the active general aviation aircraft in the United States and account for over half of the total hours flown in the nation's airspace. One of AOPA's primary purposes is to represent the interests of general aviation before the federal and state legislatures, courts, and regulatory agencies. AOPA brings to the Court a knowledge of airport operations and regulation affecting the non-carrier aviation community, as well as general aviation's concerns for maintaining the overarching federal aviation policy of fair access to the nation's airports and airspace without unreasonable restrictions for all classifications or categories of aviation.

The instant case presents issues of major significance for continued reasonable general aviation access to approximately 578 airports of all sizes throughout the United States serving scheduled and unscheduled air carrier and general aviation traffic. FAA Airport Activity Statistics of Certificated Route Air Carriers, Calendar Year 1991, at v. Thousands of AOPA's members reside in Michigan and neighboring states. They and other AOPA members reasonably may be expected to utilize the Kent County International Airport either on a regular or itinerant basis. They have a vital pecuniary interest in the fee structure for air operations facilities and services. More importantly, the Court's opinion will undoubtedly have a direct precedential impact on the general aviation user fee methodology of airports in every section of the country. Indeed, since general aviation users at Kent County Airport were not party to the proceedings below, the views of AOPA as expressed in this brief are essential for a balanced, objective review of the issues presented.

[1] *E.g.*, in 1989, air traffic at U.S. airports with traffic control towers consisted of 37,713,390 general aviation operations; 20,841,117 air carrier and air taxi operations; and 2,767,457 military operations. An "airport operation" is defined as an "aircraft takeoff or landing." Federal Aviation Administration (FAA) Statistical Handbook of Aviation, Calendar Year 1989, at 2-15, G-2. At that time, 219,737 general aviation aircraft were in use, as compared with 5,778 air carrier aircraft of all types. General aviation pilots flew 35,012,180 hours in 1989, while air carrier flight time totaled 12,687,535 hours. *Id.* at 5-4, 5-7, 8-3, 8-5.

The resolution of this case could have a profound impact on general aviation user fee schedules, and thus on the continuing access of general aviation aircraft, without undue restrictions, to airports across the United States. AOPA is eminently qualified to represent general aviation interests in this regard.

SUMMARY OF ARGUMENT

Petitioner airlines assert, in part, that Kent County International Airport discriminates unjustly under the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513 (1988 & Supp. III 1991), and the Interstate Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, in favor of general aviation[2] with respect to the assessment of fees for air operations facilities and services—such as runway and taxiway maintenance, airport lighting, ice and snow removal, and navigational aid services. These claims are not supportable in fact or as a matter of law.

1. As long as user fees for a particular class of aviation—commercial air transport carriers or general aviation—are reasonable in relation to the airport's actual cost of providing air operations services to that user, the AHTA provides no legal basis for one user class to challenge the charges levied upon the other aviation category.

[2] Based on evidence at trial, the District Court found that general aviation for purposes of this litigation comprises "corporate aircraft and privately owned aircraft that are not in commercial, passenger, cargo, or military service." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. 1112, 1114 (W.D. Mich. 1990).

The AHTA was enacted to prohibit local taxation of either the right of aircraft operators to engage in air commerce or of air passengers to travel by air transportation. Congress believed such taxation was in conflict with the comprehensive federal system of airport regulation and development assistance, as well as inhibiting to the growth of a vital U.S. air transportation system. The statute, however, preserved an airport's ability to charge aviation users for operational services provided, subject only to the limitation that user charges are reasonable, *i.e.*, not excessive in relation to the airport's actual cost of providing such services to a particular user.

It would be a serious mistake for the Court to interpret the AHTA to reach beyond this originally-intended purpose to impose a requirement that each aviation class must in all circumstances pay, through airport user fees, the full 100 percent of costs allocated to that user category for airside services. By thus depriving local airports of the flexibility, for valid economic and policy reasons, to fund some portion of the air operations cost allocation to either or both aviation classes, the decision of the Court in this case could greatly impair the U.S. policy of airport and airway access to all segments of aviation without unreasonable restriction. Moreover, the Court should refrain from infringing upon the prerogatives of the Secretary of Transportation, who is required and entrusted in the first instance to balance federal aviation policy interests to ensure that airports receiving federal development funds are "available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210(a)(1) (1988). *See also* Brief for the United States as *Amicus Curiae* in Opposition to Petition for Writ of Certiorari at 14-16.

2. In the event the Court should grant Petitioners' claim of Commerce Clause applicability in this case, it is essential that the Court correct the misimpression that general aviation, as a matter of fact, is essentially intra-

state commerce. Moreover, this Court in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 718-19 (1972), previously acknowledged that an airport may make rational distinctions between commercial and general aviation in assessing fees for air operations services without placing an undue burden on interstate commerce.

ARGUMENT

I. THE ANTI-HEAD TAX ACT DOES NOT PROVIDE GROUNDS FOR ONE CLASS OF AVIATION USER TO CHALLENGE AIRPORT FEES LEVIED UPON ANOTHER AVIATION USER CLASS.

AOPA supports Petitioner airlines' view that fees for the privilege of doing business at an airport levied upon non-aeronautical concessions—such as restaurants, parking lots, car rental agencies, airport shops, and advertisers—must be used, along with all airport revenues generated from other users, to fund airport operations, maintenance, development, and other aviation-related functions. The Airport and Airway Improvement Act of 1982 demands that an airport like Kent County International, which receives federal development funds, maintain a fee structure for airport users that will make the airport self-sustaining. All revenues generated by an airport must be expended only for airport-related operations and capital improvement. 49 U.S.C. App. §§ 2210(a)(9) & (12) (1988).

AOPA's objection to Petitioners' argument under the Anti-Head Tax Act, 49 U.S.C. App. § 1513 (1988 & Supp. III 1991), is the erroneous proposition that the AHTA's proscription on unreasonable user charges for aircraft operators enables one category of aircraft operator to raise claims of unjust discrimination with regard to airport fees applied to another distinct and dissimilar category of aviation users.

Along with the Seventh Circuit Court of Appeals in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), Petitioners appear to have overlooked the purpose of the AHTA and focused not on the operative language and intent of the statute, but rather on its exclusionary provisions. The intent of Congress in enacting the AHTA—following on the heels of *Evansville-Vanderburgh Airport*—was to ensure that air passengers are taxed at a uniform rate by the Federal Government and not subject to various direct or indirect taxes on air travel levied by state and local governments, without any assurance that revenues generated would be earmarked for airport development. Such local taxation would inhibit the flow of interstate commerce and retard the growth of air transportation. S. Rep. No. 12, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1434-35, 1446. Nowhere in either the Senate or House of Representatives reports on the legislation by which 49 U.S.C. App. § 1513 was enacted is there indication that Congress considered landing, parking, or fuel flowage fees to be excessive generally at U.S. airports, or that airline and general aviation user charges were unjustifiably disproportionate. *Id.* at 1973 U.S. Code Cong. & Ad. News 1434; H.R. Rep. No. 157, 93d Cong., 1st Sess. (1973).

The AHTA's limitation on unreasonable aircraft operator user fees, 49 U.S.C. App. § 1513(b) (1988), was meant only to clarify that Congress did not intend for its prohibition of any "tax, fee, head charge, or other charge" on persons traveling in air commerce or the sale of air transportation, 49 U.S.C. App. § 1513(a) (1988 & Supp. III 1991), to be interpreted to include *bona fide* fees for actual airport services provided to aircraft operators. The statute thus gives an aircraft operator a basis to claim that airport fees charged to *that particular operator* are unreasonably high or arbitrary in relation to the airport's actual costs in supplying airside facilities and services.

The AHTA was not meant to serve as the standard for comprehensive review of an airport's overall user fee schedule to ensure complete equity among all types of users. That is a function, in the first instance, of the Secretary of Transportation, with whom rests the statutory responsibility to balance the competing interests of all airport users in furtherance of the overriding federal aviation policy and mandate that airports "be available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210(a)(1) (1988).

General aviation certainly does not object to paying its properly allocated share of the cost of air operations facilities, equipment, and services. It would be unfortunate, however, should the Court interpret the AHTA so as to prevent an airport from assessing a particular aviation user class less than the maximum charges reasonably permissible, so long as another class of aviation user is not required to make up the difference. Many valid economic and local governmental policy reasons might be served by an airport operator's decision to fund some portion of operational costs attributable to a particular aviation user class, including the airlines, from non-aeronautical airport revenues.

There would be no basis for complaint under the AHTA, for example, if an airport funded the entire cost of airside facilities and services from other revenues or public funds. A municipality might desire to foster the development of aviation-related industry in the local area. Alternatively, an airport proprietor might wish to charge commercial aviation less than its full operational costs in order to encourage the establishment or expansion of airline service for residents of the community. In such case, general aviation would have no complaint under the AHTA—so long as general aviation was not required to pay more than its fair allocation devised under a methodology properly reflecting the actual cost of servicing

general aviation and not designed intentionally to make airport access to non-commercial aircraft financially prohibitive.

Similarly, Petitioner airlines should not complain that, at no expense or detriment to the airlines, an airport refrains from charging general aviation its total share of the cost of airside operations. The revenues raised by general aviation user fees may not justify their administrative collection costs. Conversely, increased fees may, in fact, reduce airport revenues by causing aircraft owners and pilots to obtain aviation fuel, supplies, repairs, and services at other airports. Moreover, as Chief Judge Merritt noted in his dissent from the Circuit Court's decision below to deny a rehearing *en banc*, "[a]s a matter of policy, most regional airports want to keep some general aviation on the field for a variety of reasons. The general aviation fleet, the number of new pilots and other similar statistics are in serious decline." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d 1054, 1066 (6th Cir. 1992). General aviation supports a significant industry of aircraft mechanics; flight instructors; and suppliers of aviation supplies, parts, and services. It also provides local communities with aircraft and aviators for life-saving emergency, rescue, and humanitarian aid transport; police, fire, and traffic patrols; agricultural services; and untold other aerial activities. *See, e.g.*, Trial testimony of Robert A. Ross, Director of Aeronautics at Kent County Airport (Ross Testimony), at 697-702 (describing the nature of general aviation activities at the airport).

The test for compliance with the AHTA thus should be: (1) does the contested fee purport to tax air travel, or is it facially a valid charge for airport services; and (2) if the latter, is the fee arbitrary, capricious, or unreasonable in relation to the airport's actual cost of providing such services to the complaining aviation user

class. As characterized by Senior Circuit Judge Contie below:

> The Airlines do not contend that the fees charged them for their airside operations costs are arbitrary or capricious and concede that the fees are based on the actual break-even costs calculated on the basis of aircraft weight and number of landings. Because the fees charged to the Airlines for their airside operations have a reasonable relationship to the actual costs incurred, they are reasonable within the meaning of the Anti-Head Tax Act.

955 F.2d at 1065. *Cf. New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 170 (1st Cir. 1989) (evaluating alleged AHTA violation by focusing first on the *nature* of the contested fee as either a tax on air travel or an operating expense).

Petitioner airlines do not contest the airport's method of allocating the cost of air operations between the air carrier and general aviation users.[3] Petitioners' argument is that the airlines are assessed 100 percent of their allocated share, while general aviation users are required to pay less than their full allocation. Establishment of a requirement to collect the full general aviation allocation from user fees levied upon general aviation aircraft operators, however, would not necessarily put money back in the pockets of the airlines or their passengers. The air-

[3] AOPA does not necessarily accept, as a matter of fact, the accuracy of Kent County Airport's allocation of airside operations costs as between the airlines and general aviation. The allocation itself appears to be weighted disproportionately against general aviation. It fails to reflect that, were it not for the presence of the airlines, the airport might not require its lengthy runway and taxiway network; sophisticated lighting system and navigational equipment; airport security system; runway safety areas and fencing; extensive airport infrastructure; crash, fire, and rescue services; ice and snow removal capabilities; and other facilities, equipment, and services unnecessary for most general aviation operations. *See* Ross Testimony at 655-84; 14 C.F.R. pt. 139 (1993).

port applies other airport revenues obtained from non-aeronautical concessionaire fees to cover the general aviation "shortfall" and help defray the significant expense of airside operations. If general aviation operators were assessed their full allocation, the airport still could require the airlines to pay 100 percent of their properly allocated share. 955 F.2d at 1064-65. This Court's acceptance of Petitioners' discrimination claim would merely result in potentially significant increases in airside user fees for general aviation aircraft, with no corresponding savings to the airlines, at the many airports across the country that serve both categories of aviation users.

Petitioners assert that the airlines are harmed because concession revenues applied toward the general aviation portion of airside operations could conceivably be used to purchase airport improvements or additional equipment. They also claim airline ticket revenues would increase if concession fees, which are passed on to airline passengers, were not used to defray general aviation's share of operational expenses. Brief for Petitioners at 38. At the very heart of this lawsuit, however, is Petitioners' objection that the airport amasses surplus revenues far in excess of current and reasonably foreseeable future operating costs. Moreover, there has been no indication or reason to suppose that elimination of the airport's support for general aviation would prompt it to institute a corresponding reduction in concession user fees. Concession fees are established on the basis of traditional market principles. By charging general aviation its total allocated share, the airport would only increase its contingency fund coffers with no added benefit to the airlines or savings for their passengers.

Petitioners claim also that, to the extent the airlines and general aviation are competing modes of travel, the undercharging of general aviation for airside operations puts the airlines at a competitive disadvantage. *Id.* The District Court below found, however, that general aviation

at Kent County Airport is comprised of corporate and privately-owned aircraft not involved in the carriage of passengers for hire as a commercial enterprise. 738 F. Supp. at 1114. Moreover, travel by general aviation aircraft, as opposed to the airlines, is more likely chosen for reasons primarily unrelated to relative cost, such as business necessity or convenience, pursuit of an aviation avocation, personal transportation, or lack of scheduled airline service to remote or less populated destinations.

The commercial airlines and general aviation are unique classes of aviation users often involved in entirely different types of airport usage and aviation activities. Petitioners' claim of unjust discrimination *vis-a-vis* general aviation thus is not supportable under the AHTA either as a matter of law or fact.

II. THE AIRPORT'S USER FEE METHODOLOGY PLACES NO UNDUE BURDEN ON INTERSTATE COMMERCE.

The Parties differ over whether the enactments by Congress of the AHTA and the Airport and Airway Improvement Act, 49 U.S.C. App. §§ 2201-2227 (1988 & Supp. III 1991), foreclose the courts from engaging in a Commerce Clause review of airport user fees. AOPA concurs with the Solicitor General that, under the comprehensive statutory scheme of federal aviation regulation, Petitioner airlines' claim of unjust discrimination in favor of general aviation with regard to airport user fees should have been presented in the first instance for resolution by the Secretary of Transportation. *See* Brief for the United States as *Amicus Curiae* in Opposition to Petition for Writ of Certiorari at 9-16. The courts should thus refrain from engaging independently in a dormant Commerce Clause review. Should Petitioners' claim of Commerce Clause applicability be granted, however, it is essential the Court appreciate that the different treatment of the airlines

and general aviation at Kent County Airport does not, in fact, disproportionately shift the costs of airport operations from local to out-of-state users.

Unsupported judicial conclusions equating general aviation with intrastate commerce, as in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d at 1271, are based on erroneous assumptions. Even the *amicus* brief of American Trucking Associations, Inc., in the present case—the entire thrust of which is to preserve an Interstate Commerce Clause review—reflects substantial doubt as to whether general aviation may properly be categorized as intrastate commerce sufficiently even to give rise to a colorable Commerce Clause claim by Petitioners of disparate treatment by the airport. Brief for American Trucking Associations, Inc., as *Amicus Curiae* Supporting Petitioners at 22-23 & n.8.

The record in this case contains no evidence to support a conclusion that general aviation constitutes intrastate commerce or that the airlines and general aviation are similarly situated. To the contrary, in the little trial testimony addressing the nature and type of general aviation at Kent County Airport, Aeronautics Director Ross repeatedly stressed the existence of significant itinerant, *i.e.*, non-locally based, general aviation traffic. Ross Testimony at 697-702.

In point of fact, Federal Aviation Administration air traffic activity statistics disclose that of the 100,925 general aviation operations at Kent County Airport during fiscal year 1992, 57,705 of such operations, or roughly 57 percent, involved itinerant traffic. FAA Air Traffic Activity Report, Fiscal Year 1992, at 27. Earlier years show a similar pattern. The percentage of itinerant general aviation operations was even higher—approximately 63 percent—at the time this lawsuit was instituted. For fiscal year 1987, of the 97,329 general aviation operations, 61,824 were itinerant as compared with 35,505 local.

FAA Air Traffic Activity Report, Fiscal Year 1987, at 30. Since general aviation aircraft utilize the federal airways and thus operate in "air commerce" under the statutory definition, 49 U.S.C. App. § 1301(4) (1988), general avation traffic at Kent County Airport should properly be classified predominantly as interstate commerce, albeit not as common carriers in competition with the airlines. Accordingly, the premise that general aviation amounts to purely local commerce in juxtaposition to the interstate airlines cannot be maintained.

Regardless of any classification of general aviation as either interstate or intrastate commerce, its competition with the airlines for passengers is *de minimus*. Evidence presented at trial established that general aviation aircraft based at Kent County are not used for commercial passenger transport. 738 F. Supp. at 1114. More likely, general aviation *brings* passengers to the airlines from outlying areas. The activities of local general aviation users, moreover, are markedly different from those of the airlines. Local general aviation operations primarily involve use of the airport as a base for corporate and business aviation, personal transportation, recreational flying, flight training, and emergency and public services—not as a terminal for the embarkation and debarkation of air passengers. *See* Ross Testimony at 697-98. Furthermore, the Circuit Court below concluded that the airlines bear no additional financial burden for air operations costs that otherwise would not exist were general aviation and the airlines both charged 100 percent of their properly allocated operational costs. 955 F.2d at 1064-65. The airport's treatment of general aviation differently from the airlines with regard to collection of user fees thus has an inconsequential impact on the airlines' business of interstate carriage of air passengers.

In *Evansville-Vanderburgh Airport*, this Court held that distinctions typically made with regard to airport charges based on commercial versus private use do not

amount to actionable discrimination in violation of the Constitution. Under *Evansville*, an airport user charge meets constitutional muster so long as it: (1) does not discriminate unjustly against interstate commerce or travel; (2) reflects a fair approximation of use or privilege of use; and (3) is not excessive in comparison with benefit conferred. 405 U.S. at 716-17. Under the third prong of the *Evansville* standard, Petitioners would not object to the Kent County Airport's allocation of air operation costs between general and commercial aviation. They maintain with regard to their discrimination claim under the AHTA only that non-aeronautical airport concession fees are not credited toward the airlines' allocation. As to the other two prongs, under which the disparate treatment of general aviation might be contested, the *Evansville* Court specifically found that different treatment of the airlines and general aviation is reasonable.

The *Evansville* analysis reflects an implicit recognition by the Court that the issue is whether airport fee schedules discriminate between similarly situated commercial air carriers flying interstate and intrastate routes, not between commercial and general aviation. *Id.* at 717. The Court did acknowledge that the general aviation fee schedule might be a relevant consideration in conjunction with the second prong of the test, *i.e.*, whether the charges reflect a fair approximation of the use of the facilities for which they are imposed. The Court concluded, however, that rational distinctions between general and commercial aviation could properly be drawn, especially in view of the substantial expenses associated with installing, maintaining, and operating the lengthy runways and taxiways, extensive airport and approach lighting systems, and sophisticated navigational equipment required to accommodate the commercial carriers. *Id.* at 718-19. *See also* note 3 *supra*. "In short, distinctions based on aircraft weight or commercial versus private use do not render . . . [the different charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied." 405 U.S. at 719.

Accordingly, even if the Court were to rule favorably on Petitioner airlines' request for review under the Interstate Commerce Clause, differentiations made by Kent County Airport in assessing airside operations fees for the airlines and general aviation could not be viewed as placing an unconstitutional burden on interstate commerce.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

JOHN S. YODICE
Counsel of Record
RICHARD K. KETLER
YODICE ASSOCIATES
500 E Street, S.W., Suite 930
Washington, D.C. 20024
(202) 863-1000
Counsel for Aircraft Owners and Pilots Association